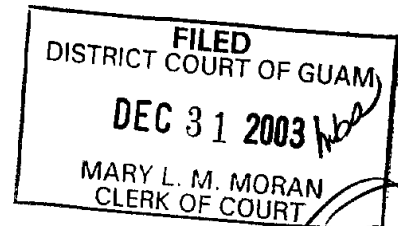


1 Tony H. Ashtiani  
2 P.O.Box 12723  
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4 671-688-4844  
5 671-653-5575



6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF GUAM**

8 Tony H. Ashtiani,  
9 Plaintiff,  
10 Vs.  
11 Continental Micronesia Inc,  
12 DbA, Continental Micronesia,  
13 Continental Airlines,  
14 Defendant.

)  
)  
) Civil Case No.: 02-00032  
) **AMENDED**  
) **OPPOSITION TO DEFENDANTS' MOTION**  
) **TO STRIKE UNAUTHENTICATED**  
) **EXHIBITS. COUNTER MOTION TO**  
) **STRIKE DEFENDANTS' EXHIBITS.**  
) **AFFIDAVIT AND DECLARATION OF**  
) **VINCE DIAZ. AFFADAVIT OF TONY**  
) **ASHTIANI TO AUTHENTICATE**  
) **EXHIBITS ON RECORDS.**

15 ) **RULE 56**

16 ) **28. USC 1746**

17  
18 In pursuant to Fed Rule of Civ. P Rule 15, plaintiff makes this  
19 amendment to caption and page 7 as to "Counter Motion" plaintiff made  
20 this error due to ongoing cross motion for summary judgment.

21  
22 This matter before the Court I n reference to defendants Motion to  
23 strike Ashtiani's Exhibits, Defendant here, has provided a vehicle for  
24 plaintiff to submit further affidavit in opposition and opportunity to  
25 authenticate exhibits on record in his opposition to defendants motion

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**ORIGINAL**

1 to strike, failing that Rule 56 (e) "The court may permit affidavits  
2 to be supplemented or opposed by depositions, answers to  
3 interrogatories, or further affidavits."

4 Plaintiff submits further *affidavit of Vince Diaz* in support of  
5 his claim of defendants' bad affidavit made rule 56 (g), Plaintiff had  
6 also addressed this issue at motion hearing.

7  
8  
9 Prior to filing a motion for Partial summary judgment plaintiff  
10 reviewed the rule 56, and looked at few cases, and noticed a supreme  
11 court case that was frequently cited. "But unlike the Court of  
12 Appeals, we find no express or implied requirement in Rule 56 that the  
13 moving party support its motion with affidavits or other similar  
14 materials *negating* the opponent's claim. On the contrary, Rule 56(c),  
15 which refers to "**the affidavits, if any**" (emphasis added), suggests  
16 the absence of such a requirement. And if there were any doubt about  
17 the meaning of Rule 56(c) in this regard, such doubt is clearly  
18 removed by Rules 56(a) and (b), which provide that claimants and  
19 defendants, respectively, may move for summary judgment "**with or**  
20 **without supporting affidavits**" (emphasis added). The import of these  
21 subsections is that, regardless of whether the moving party  
22 accompanies its summary judgment motion with affidavits, the motion  
23 may, and should, be granted so long as whatever is before the district  
24 court demonstrates that the standard for the entry of summary  
25

1 judgment, as set forth in Rule 56(c), is satisfied. Celotex Corp. v.  
2 Catrett 106 S.Ct. 2548 id at 2553

3  
4  
5 Further more, There were many cases that referred to these  
6 languages of "with or without affidavit" and "if any" led plaintiff to  
7 believe of it necessity to even requiring affidavit.

8  
9 "A declaration under penalty of perjury may always be substituted  
10 for a sworn affidavit" See Matthew & Bender forms and 28 USC 1746.

11  
12 Unsworn statement signed under penalty of perjury could be used,  
13 in lieu of sworn statement or affidavit, in support of opposition to  
14 motion to dismiss which was treated as motion for summary  
15 judgment. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.; 28 U.S.C.A.  
§ 1746.Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v.  
Medfit Intern., Inc. 982 F.2d 686

16 Declaration of Vince Diaz, Joe Pangelinan, Ron Roberts, Kathleen  
17 P. Sgambelluri and Mark Williams are all admissible evidence.

18 Declaration which recited that it was made under penalty of perjury  
19 was **admissible** in support of summary judgment motion under  
20 statute permitting unsworn declaration made under penalty of  
21 perjury to **substitute for sworn affidavit.** 28 U.S.C.A. § 1746.  
McLaughlin v. Cohen 686F.Supp.454

22 Pro se plaintiff in his affidavit and his declaration states  
23 under penalty of perjury that the forgoing is true and correct.  
24 "(When pro se civil rights plaintiff properly executed form complaint  
25 which called for declaration in conformity with federal statute  
requiring that affiants declare under penalty of perjury that  
foregoing statements in form are true, plaintiff's statement of claim

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1 was transformed from "mere allegations" of pleading into "specific  
2 facts" as in evidentiary affidavit and, therefore, plaintiff's failure  
3 to proffer evidentiary materials directly in opposition to defendants'  
4 motion for summary judgment, without more, did not mandate entry of  
5 summary judgment in favor of defendants". 42 U.S.C.A. § 1983; 28  
6 U.S.C.A. § 1746. McNeal v. Macht 763 F.Supp. 1458.

7 And even then, defendant had duty to provide plaintiff with notice in  
8 plain English language of all necessary documents and how the formal  
9 contents should be. ("In sum, absent a clear indication that the *pro se*  
10 litigant understands the nature and consequences of Rule 56--as is  
11 required under Vital and which we reiterate today--he or she must be  
12 so informed by the movant in the notice of motion"). *McPherson v.*  
13 *Coombe* 174 F.3d 276.

14  
15  
16 A claim of race discrimination may be established either under  
17 the direct evidence method or the indirect burden-shifting method.  
18 Plaintiff has succeeded in showing evidence that there were other  
19 mechanics that did not have to call supervisor when calling sick See  
20 Vince Diazs' affidavit. In order to establish employment  
21 discrimination under the McDonnell-Douglas burden-shifting test, an  
22 employee must first establish a *prima facie* case by demonstrating,  
23 among other things, that a similarly situated person outside the  
24 protected class was treated better.  
25

1  
2 A claim of race discrimination may be established in one of two ways--  
3 under the direct method or the indirect burden-shifting method. See  
4 Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir.1997).  
5 Accordingly plaintiff supervisors has treated Ashtiani differently and  
6 through direct and circumstantial evidence that the employer decision  
7 was pretext.

8 For Example, In a wrongful discharge of title VII case where the  
9 plaintiff alleges that he or she was discharged for discriminatory  
10 reasons, one source and undisputed fact might be stated as follows:  
11

12  
13 **Source:**

**Undisputed Fact:**

14 Corporate documents shift turn over logs  
Admissible Rule 803(6)

*Vince Diaz Affidavit at 3,4,5*

15 April 03, 2002, Rodriguez calls Ruiz  
16 Non-Supervisory Exhibit (29)

"Mechanics other than supervisor in the  
maintenance Department took sick call  
Messages from other employees."

17 May 14, 2002, Martinez calls Saclot  
18 Non-Supervisory Exhibit (30)

"Message of incoming calls were either noted in  
the shift turn over log, or on the message board or  
passed on verbally to the supervisor on duty."

19 May 27, 2002, Raqueno calls Therrell  
Non-supervisory Exhibit (31)

"I have personal knowledge mechanics whom  
called another mechanic for sick calls were not  
considered No-call/ No- Show and were not  
reprimanded. This was in house policy at CMI  
Maintenance Dept."

20  
21  
22  
23 **Rule 56 (g). Bad affidavit made.** Mckinzie at P 16 "As the IBT Agreement and Continental's Attendance  
24 policy state, "When reporting an absence an absence from work, an employee must Speak directly to  
25 supervisor .A phone call to non supervisory personal, such as to another mechanic does not constitute  
proper Continental protocol for reporting such absence".

1 Ashtiani submitting corporate records of (3) individual instances  
2 at different dates of (3) different mechanics calling (3) Non-  
3 supervisory individuals exhibits (29), (30), (31) and affidavit of Vince  
4 Diaz the conclusion is inescapable. "While the qualified witness  
5 testifying as to document sought to be introduced under business  
6 records exception to hearsay rule need not be the person who prepared  
7 the record and need not have personal knowledge of the entries in the  
8 record, the qualified witness must have knowledge of the procedure  
9 under which the records were created. Fed.Rules Evid.Rule 803(6), 28  
10 U.S.C.A.Overton v. City of Harvey 29 F.Supp.2d 894  
11

12  
13 The fact remains that both Ashtiani and Diaz are qualified  
14 witnesses and have knowledge of the procedure under which the records  
15 were created. In other hand McKinzie's affidavit at 16 implying that  
16 in house policy did not apply to Ashtiani. Intent of congress in title  
17 VII is clear that employer provide equal treatment and equality  
18 regardless of race and nationality and creeds.  
19

20 Ron Roberts conversation with James Hammer in Roberts'  
21 declaration is important element because in title VII. (affidavit  
22 describing conversations sufficient in title VII action) See Sarcha v  
23 Sears, Roebuck & Co., 3 F.3d 1035,1041 (7th Cir.1993) as it has been  
24 established that declaration under penalty of perjury is substitute  
25 for affidavit.

1  
2 In re Greenwood Air Crash, 924 F.Supp. 1511, 1514 (S.D.Ind.1995)  
3 ("Production of a document by a party constitutes an implicit  
4 authentication of that document."). Thus, the court finds that all of  
5 the exhibits at issue have been authenticated.) *International Paper*  
6 *Co. v. Androscoggin Energy LLC*. "(Exhibits offered in support of  
7 movant's motion for summary judgment were properly authenticated,  
8 since they were produced in discovery by its opponent)". Fed.Rules  
9 Civ.Proc.Rule 56, 28 U.S.C.A.; Fed.Rules. Evid.Rule 901, 28 U.S.C.A. .  
10

11  
12 Defendants request to strike plaintiff's exhibits is dubious ,as  
13 defendant have produced them through rule 34 production of documents,  
14 in other hand defendant is asking to fight with double edged sword  
15 because Ashtiani is proceeding pro se. plaintiff works very hard  
16 reading the rules and works even harder for his pleadings from what I  
17 can gather by looking up dictionary. Accordingly, defendant need to  
18 understand and engage into facts and understand that pro se litigants  
19 rights are one the most essential elements in constituently rights.  
20

21 COUNTER MOTION TO STRIKE DEFENDATS' EXHIBITS.

22 Plaintiff's moves to strike all defendants exhibits that do not  
23 meet the requirement of Fed Rule of Evid 803 and 901 and that do not  
24 have company letter head or logo. "(Interoffice memorandum on company  
25 letter head properly admissible)" under (Fed Rule Evid. 803 and 901)

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1 790 F.2d 1249 5th Cir.1986 United States v. Malandondo-Rivera there  
2 are hardly any documents of defendant that meet this requirement. It  
3 is not that defendant does not have any 8 and 1/2 by 11 inch company  
4 letter Head papers.

5  
6 Plaintiff assertion in strike of all defendants emails look alike  
7 Exhibits comes from inconsistency of E-mails and that Herrera writes  
8 to himself, Herrera to Herrera, Common man does not do this kind  
9 things unless he was paper trailing. (Authentication can be achieved  
10 through appearance, contents, substance, internal patterns, or other  
11 distinctive characteristics taken inconjunction with circumstances Fed  
12 ,R. Evid 901 (b) (4).

13  
14  
15 There fore, upon close examination of Herrera's notes and emails  
16 it is concluded that they have presented hearesay evidence under rule  
17 802.1 Rule 802: Hearsay is not admissible and that Mckinzie, Herrera,  
18 Mendoza all interest parties in this suit and McKinzie and Hammer are  
19 both director in official capacity are named defendant in this law  
20 suit and that they are authority over Herrera and Mendoza. these  
21 documents were fabricated and are not admissible.

22  
23 ("email on the ground that it appears on its face not to have  
24 been sent and is **unauthenticated**") ... S & S Textiles Intern. v.Steve  
25 Weave, Inc. Mr. McKinzie, Herrera, Mendoza erroneous emails attached



1 affidavit is insufficient to support a conclusion that the **email** is a  
2 business record as defined in Rule 803(6). Furthermore, even if the  
3 **email** were admissible as a business record, the document contains  
4 second and third-hand hearsay. Plaintiffs was not even aware of these  
5 emails until after defendant was charged with discrimination by EEOC.  
6 negate the likelihood of deliberate or conscious misrepresentation."  
7 Fed.R.Evid. 803 "underlying theory".  
8

9  
10 ("Absence of routineness of these e mails raises many ill will,  
11 bad faith malice and recklessness on the part of defendant and that  
12 there are no consistency or accuracy in these emails. Under Rule  
13 803(6), plaintiff is obligated to prove digital signature of these  
14 emails.  
15

16 "(The district court held that the affidavits and **emails** were  
17 inadmissible **hearsay** and that Stevens had the opportunity to depose the  
18 affiants but chose not to do so)" Shipping and Terminal Company v.  
19 JAPAN RAINBOW, II MV 334 F.3d 439  
20

21 Here, defendant had multiple opportunity to depose all affiants  
22 Mckinzie, Herrera, Mendoza, and Ashtiani and has failed to do so and  
23 now is relying on internal emails unworthy of believe which does not  
24 even meet the standards on Fed Rule of evidence because it has no  
25

1 digital signature and is inconsistence with the name of addresses.  
2 Memos signed during EEOC investigation after the fact are inadmissible  
3 dated January 24, 2002.( 8 Months after Ashtiani's termination) these  
4 documents have offered for anything other than the truth asserted  
5 therein.

6  
7 Accordingly, Plaintiff moves to strike defendants Exhibits  
8 E,F,J,K, (L(2)EACH),M,N, (Q (2)EACH) in defendants Motion for summary  
9 judgment.  
10

11  
12 Respectfully submitted,

13  
14 This 31<sup>ST</sup> day Of December, 2003.

15  
16   
17

18 Tony H. Ashtiani

19 Pro se  
20  
21  
22  
23  
24  
25